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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JAMES S. BROWN, Plaintiff and Appellant, v. CMG ESCROW CO., et al., Defendants and Respondents.	2d Civil No. B215706 (Super. Ct. No. 56-2008-00315805-CU-FR-SIM) (Ventura County)

James S. Brown is alleged to have been the victim of a real estate scam purportedly perpetrated by Dax Dorsch and Mark and Gonzalo Delatoba. Brown claims Dorsch and Mark Delatoba forged Brown's name on a grant deed, deed of trust, and two promissory notes and used the documents to open an escrow to obtain a loan secured with Brown's residence. The escrow closed and a lien was recorded against the residence without Brown's knowledge.

Brown filed a complaint against all the entities involved in the transaction alleging numerous causes of action, including slander of title against the escrow holder, its owner and an employee. The trial court granted the escrow defendants' motion for judgment on the pleadings stating numerous grounds for doing so. We affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The following account is taken from the allegations of the complaint, which we accept as true. Brown inherited a single family residence and other property from his

mother in 1998. In 2005, he decided to obtain an equity loan on the residence to enable him to resume his former occupation as a heavy equipment owner and operator. At that time, the residence was worth $500,000. The sole encumbrance on the property was a deed of trust securing repayment of a $15,000 loan made to him by a friend, Ken Jones. Brown was unsuccessful in obtaining a loan from a bank or other conventional financing source because he had no regular source of income.

In January 2006, Brown met Dax Dorsch and Mark Delatoba of Emerald Pacific Group (Emerald). Brown requested a loan of $65,000. During negotiations, Dorsch and Delatoba asked Brown to invest in a check cashing business. Brown's investment would be funded by a loan in the amount of $265,000 to be secured by a deed of trust against his residence. Dorsch and Mark Delatoba proposed the following terms: (1) Emerald would make an initial short-term loan to Brown of $57,500; (2) monthly payments on the loan would be interest-only at the rate of 12 percent per annum, and the principal would be repaid in one balloon payment on April 30, 2006; (3) the short-term loan would be conditioned on execution of a long-term loan, the proceeds of which would be used to pay off the short-term loan, with the balance to be invested in the check cashing business; (4) as consideration for the long-term loan, Brown would receive monthly payments in the amount of 2.5 percent of the amount of the long-term loan; and (5) the monthly installments of principal and interest on the long-term loan would be paid in full by the check cashing business throughout the term of the long-term loan.

Brown agreed and executed a short-term promissory note, a long-term promissory note, and a deed of trust against his residence. Gonzalo Delatoba, rather than Emerald, was the payee of the promissory notes and the beneficiary of the deed of trust. Brown received only $20,000 from the short-term loan.

On March 13, 2006, Dorsch and Mark Delatoba opened an escrow with respondent CMG Escrow Company (CMG) using documents containing Brown's forged signature, including (1) a promissory note in the amount of $375,000 payable to New Century Mortgage Company (New Century), (2) a deed of trust encumbering Brown's residence as security for payments due under the promissory note, (3) a grant deed

conveying title to the residence, and (4) escrow instructions to CMG directing payment of all sums owed to Brown at the close of escrow to Aura Development Company. All the documents were notarized by Forest Reed, a licensed notary public.

On March 30, 2006, the escrow closed and the $375,000 was deposited into escrow by New Century to be disbursed as follows: (1) $57,500 to Gonzalo Delatoba to pay off the short-term loan, (2) $16,000 to Ken Jones to pay off his loan to Brown, (3) an unknown amount for escrow and title expenses, and (4) the balance to Aura Development Company.

Brown was not advised of the escrow transaction and forgeries until after the escrow had closed and a lien recorded against his residence. As a result, the mortgage holder is holding him liable for payments on the loan of $2,679.50 per month.

On June 4, 2006, Brown filed a complaint with the Simi Valley Police Department against Dorsch and Mark and Gonzalo Delatoba. The matter was referred to the Ventura County District Attorney's office for prosecution. During the month of June, Dorsch and Mark Delatoba came to Brown's residence and threatened him with physical harm unless he withdrew the criminal complaint. They reiterated the threat in a subsequent telephone call.

Brown alleges on information and belief that Dorsch and the Delatobas were making partial payments due on the promissory note and deed of trust to the mortgage holder, but in amounts insufficient to cure the accrued delinquencies. The mortgage holder accepted those payments while continuing to send Brown monthly mortgage statements. Foreclosure proceedings were commenced against Brown's residence.

On March 28, 2008, Brown filed a complaint for damages and injunctive relief against the persons and entities allegedly involved in the fraudulent transaction. The complaint alleged slander of title, "misfeasance and malfeasance of a licensed escrow agent," and negligent and intentional infliction of emotional distress against CMG and Gutierrez. The complaint did not attach the escrow instructions or plead their

contents. Subsequently, Brown amended the complaint to name Mercedes Fernandez, an employee of CMG, as a Doe defendant.

CMG, Gutierrez, and Fernandez filed a demurrer on the grounds that the complaint failed to state facts sufficient to state a cause of action against them because it contained no allegation that they had knowledge of the forgery, the documents were notarized outside of escrow and Brown's signature was presumed to be valid, and they owed no duty to Brown to make further inquiry concerning the authenticity of the documents. They also demurred for uncertainty due to Brown's failure to attach or plead the escrow instructions.

Brown filed opposition to the demurrer asserting that the complaint stated a cause of action against the escrow defendants because malice is not an element of an action for slander of title, the complaint states a cause of action for misfeasance and malfeasance of fiduciary duties because the escrow defendants knew or in the exercise of reasonable care should have known that the escrow documents were forgeries, and the complaint sufficiently stated a cause of action for intentional infliction of emotional distress.

On July 31, 2008, the court sustained the demurrer in its entirety with leave to amend on the grounds that the complaint was "devoid of any factual specificity as to what the 'escrow defendants' did wrong, . . . [and] fail[ed] to meet the requirements of notice pleading," and the failure to attach or plead the escrow instructions rendered the complaint "uncertain and legally insufficient since the only obligations assumed by an escrow holder are those set forth in the written escrow instructions."

Brown filed an "Amendment No. 1 to Second Cause of Action" only as to the slander of title cause of action. The amendment added an allegation that the escrow defendants (1) "caused the forged deed of trust to be recorded against the BROWN PROPERTY," (2) "[b]y doing so, [they] disparaged the title to the BROWN PROPERTY," (3) "were not acting under any apparent privilege or immunity," (4) "caused direct pecuniary loss to Plaintiff BROWN" in numerous specified ways, and (5) "[t]he recordation of the deed of trust containing the forged signature . . . directly

impaired title to the BROWN PROPERTY and caused the emotional, physical and monetary damages." The escrow instructions were not included in the amendment.

The escrow defendants filed a motion for judgment on the pleadings as to the slander of title cause of action and a motion to dismiss the remaining causes of action. The court granted the motion for judgment on the pleadings on the grounds that a complaint for slander of title must plead and prove not only that the statements were false, but that they were maliciously made with the intent to disparage the title involved, the complaint failed to plead any ultimate facts indicating that the escrow defendants knew or had reason to know that the deed of trust had been forged at the time they recorded it, or to show that they acted with malice or reckless disregard in not ascertaining that the documents were forged. The court also granted the motion to dismiss as to the causes of action Brown did not amend.

Brown purported to appeal from the dismissal of all the causes of action alleged against the escrow defendants, but in this appeal he argues only the slander of title cause of action.

DISCUSSION

Standard of Review

We review orders sustaining a demurrer and granting judgment on the pleadings de novo, exercising our independent judgment to determine whether a cause of action has been stated under any legal theory. (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 788.) We accept as true properly pleaded allegations of fact, but not contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "The burden is on [appellant] to demonstrate the manner in which the complaint might be amended, and the appellate court must affirm the judgment if it is correct on any theory." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459-460.)

The Complaint Fails to State a Cause of Action

For Slander of Title Against the Escrow Defendants

To recover damages for slander of title to real property, the plaintiff must prove six elements: (1) There must have been a direct or indirect disparagement of the owner's title, (2) the disparaging statement must have been published, (3) the matter published must be untrue, (4) when the statement was published it must not have been privileged and without justification, (5) the statement must have been made with malice, and (6) the published matter must be the proximate cause of pecuniary loss or damage to the owner of the interest. (See 5 Miller & Starr, Cal. Real Estate (3d ed. 2009) § 11.41, pp. 11-147-11-148, and cases cited.) The recordation of a false document that is invalid on its face because it is not signed by the owner constitutes a sufficient publication for slander of title. (*Forte v. Nolfi* (1972) 25 Cal.App.3d 656, 685-686.)

Brown relies on *Gudger v. Manton* (1943) 21 Cal.2d 537, disapproved on another ground in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381, to support his argument that malice is not a necessary element of the tort of slander of title. Brown's reliance is misplaced. *Gudger* is not a pleading case, but rather a challenge to an award of compensatory damages on the ground that there was no finding of malice. With regard to malice, the court stated: "[I]t has been said or intimated that malice is an essential element in slander of title. [Citations.] That malice may, however, be express or implied." (*Id.* at p. 544.) Thus, *Gudger* does not support Brown's argument that slander of title does not require pleading and proof of malice. As expressly stated in *Gudger*, slander of title requires some type of malice--actual or implied. This is consistent with subsequent California cases that hold that malice is a required element of the tort. (See, e.g., *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630-631 [demurrer sustained to cause of action for slander of title because plaintiff failed to allege malice by a title company]; see also *Hill v. Allan* (1968) 259 Cal.App.2d 470, 490 [a false communication, by itself, does not indicate malice].)

In the alternative, Brown argues that even if malice is a required element of the tort, then the allegations in the complaint that the escrow defendants acted with

willfulness, fraud and deceit are sufficient. The argument is without merit. Malice is shown by demonstrating either that the defendant knew his or her statements to be false, or that the statements were made with reckless disregard for their truth or falsity. (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 274-275.) To establish malice, there must be sufficient facts alleged to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the matter. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 90.) """. . .". . . Lack of due care is not the measure of liability, nor is gross or even extreme negligence.' [Citation.] Thus 'mere failure to investigate the truthfulness of a statement, even when a reasonably prudent person who have done so, is insufficient' to demonstrate actual malice." (*Ibid.)*

The allegations of the complaint also are insufficient to allege implied malice. In *Gudger,* the court found implied malice arising from the unprivileged nature of defendant's conduct. In *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 66-67, the court held that implied malice could be inferred from the intemperate statements and unfounded accusations against the vendor. Nothing comparable is alleged in Brown's complaint.

The complaint does no more than assert legal conclusions that the escrow defendants acted wrongfully. It contains no factual allegation indicating the specific conduct alleged to be tortious. Simply conducting escrow proceedings and causing documents to be recorded are not wrongful acts. The allegation that the escrow defendants knew or should have known that the documents were forged also is not a statement of ultimate fact, but merely a legal conclusion, as are the allegations that the escrow defendants acted in concert with the remaining defendants, perpetrated fraudulent transactions and acted willfully, wrongfully, without justification or privilege. To survive judgment on the pleadings, a complaint must contain factual allegations supporting the legal conclusions indicating why plaintiff believes the allegations are true. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 551, fn. 5; *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7.) Brown's complaint contains no such allegations.

Moreover, California has adopted the restatement rule that defines slander or disparagement of title as an intentional tort. (Rest.2d Torts, § 624; *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 857; *Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 263-264; *Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214; *Chrysler Credit Corp. v. Ostly* (1974) 42 Cal.App.3d 663, 674.) A cause of action for slander of title must plead specific facts upon which the charge is based or the particular facts upon which the willful misconduct of a person is charged. (See *Van Meter v. Reed* (1962) 207 Cal.App.2d 866, 870 ["the complaint is deficient in the light of the established rule that where the plaintiff relies on conduct of greater culpability than negligence specific facts upon which the charge is based should be pleaded"].) A complaint merely hinting at sinister activities on the part of a defendant does not state a cause of action if there is no allegation of anything unlawful or illegal in the activities complained of. (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 635; see also *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 ["In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] '. . . [Plaintiffs must plead facts] "show[ing] how, when, where, to whom, and by what means the representations were tendered"'"]; and see *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519 ["Each element in a cause of action for fraud . . . must be factually and specifically alleged. [Citation.] The policy of liberal construction of pleadings is not generally invoked to sustain a [fraud] pleading defective in any material respect"].) Brown's complaint contains no facts supporting even an inference of wrongdoing on the part of the escrow defendants.

The complaint is deficient for the further reason that Brown has pleaded no statute or other authority imposing a duty on the escrow defendants to notify him of fraud or requiring them to independently verify the authenticity of signatures on notarized documents deposited into escrow. In *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711, our Supreme Court delineated the limited duties of an escrow holder: "In delimiting the scope of an escrow holder's fiduciary

duties . . . we start from the principle that '[a]n escrow holder must comply strictly with the instructions of the parties. [Citations.]' [Citation.] On the other hand, an escrow holder 'has no general duty to police the affairs of its depositors'; rather, an escrow holder's obligations are 'limited to faithful compliance with [the depositors'] instructions.' [Citations.] Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions." (See also *Markowitz v. Fidelity Nat. Title Co.* (2006) 142 Cal.App.4th 508, 526 [same].)

Lee v. Title Ins. & Trust Co. (1968) 264 Cal.App.2d 160, is instructive. In that case, appellants sued an escrow holder in a real estate transaction alleging they knew that other defendants were defrauding appellants in connection with the transaction but failed to inform appellants of this fact. In affirming the sustaining of a demurrer without leave to amend, the court said that "it is generally held that no liability attaches to the escrow holder for his failure to do something not required by the terms of the escrow or for a loss incurred while obediently following his escrow instructions." *(Id.* at pp. 162-163; see also *Blackburn v. McCoy* (1934) 1 Cal.App.2d 648, 655 [escrow holder in an escrow for the sale of land was under no duty to disclose to the buyer that the seller was purchasing the land from the record owner in the same escrow and reselling it to the buyer at a substantial profit where the buyer's escrow instructions did not include any demand for such information].) Here also, there is no allegation that the escrow defendants failed to comply with the escrow instructions.

An escrow holder's duty does not extend to notifying the parties of any suspicious fact. While Brown ultimately suffered damages as a result of the consummation of the transaction, his damages were the result of the fraud of Dorsch and Delatoba, not any fault or breach of duty on the part of CMG, Gutierrez or Fernandez.

The judgment is affirmed. Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Barbara A. Lane, Judge

Superior Court County of Ventura

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